



## Lawyers' Committee for Civil Rights Under Law

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May 28, 2004

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**Re: Comments on Proposed Amendment to 41 CFR Part 60-1, Proposed  
Rulemaking Regarding Obligation to Solicit Race and Gender Data  
for Agency Enforcement Purposes**

Dear Mr. DuBray:

On behalf of the Lawyers' Committee for Civil Rights Under Law, I appreciate the opportunity to submit written comments on the proposed rulemaking regarding the Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes (OFCCP Proposal), published on March 29, 2004 in the Federal Register. This proposed rule is intended to provide guidance to federal contractors regarding the handling of internet job applicants and the related recordkeeping requirements.

The Lawyers' Committee is a national civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help protect the civil rights of minorities. Through advocacy and litigation, the Employment Discrimination Project of the Lawyers' Committee seeks to advance equal employment opportunity.

We strongly oppose OFCCP's proposed guidance on the definition of an applicant for a number of reasons. We joined the more detailed comments provided by the Leadership Conference on Civil Rights. However, we would like to take this opportunity to reiterate two of the most significant issues on behalf of our organization and the clients we serve. This proposal would generate significant confusion among employers and would significantly undermine the equal employment opportunity rights of job applicants.

To begin, OFCCP's proposed rule would create a standard for federal contractors that differs from the general standard for employers, as outlined in the EEOC's proposed guidance published in the Federal Register on March 4, 2004. Under the OFCCP proposal, an internet applicant is an official "applicant" only if the individual possesses

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Joseph DuBray, Jr.  
May 28, 2004  
Page 2

the "advertised, basic qualifications for the position." By contrast, EEOC's proposal does not include such preconditions.

In addition to creating conflicting governmental guidance, OFCCP's proposed rule would create a standard in conflict with established legal precedent. The law does not require an individual to be qualified for a job to be treated as a mere applicant. The law merely requires that the individual applied. OFCCP's proposed rule ignores established precedent concerning the appropriate applicant pool for analysis of an employer's hiring activities.

Additionally, OFCCP's proposed rule ignores established precedent concerning the "qualifications" that employers can use to screen applicants. An employer cannot rely on qualifications that disproportionately screen out members of a protected class, unless those qualifications are job-related and consistent with business necessity. While the proposed rule requires that the qualifications are "job-related," the rule fails to specify that the qualifications must be consistent with business necessity.

Finally, as OFCCP recognizes, this proposed rule would treat those who apply through the internet differently from those who apply through more traditional means. For example, an individual who submits an in-person application would be treated as an applicant regardless of his or her qualifications. However, an individual who applies via the internet would be treated as an official applicant only if he or she possesses the "basic qualifications," whatever they may be.

Due to these inherent conflicts with existing OFCCP guidance, EEOC guidance, and established legal precedent, we urge you to reconsider this proposed rulemaking. We do not believe that this additional, inconsistent guidance is needed in light of the guidance recently published by EEOC in coordination with OFCCP.

We appreciate the opportunity to submit these comments and hope to work with OFCCP to ensure that the Uniform Guidelines continue to protect employees from unlawful discrimination.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Foreman", with a long horizontal flourish extending to the right.

Michael L. Foreman  
Acting Deputy Director of Legal Programs &  
Director of the Employment Discrimination  
Project